Allied Aviation Service Company of New Jersey *and* Local 553, International Brotherhood of Teamsters, AFL–CIO. Case 22–CA–127150

August 19, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND JOHNSON

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on April 22, 2014, by Local 553, International Brotherhood of Teamsters, AFL–CIO, the Union, the General Counsel issued the complaint on May 6, 2014, alleging that Allied Aviation Service Company of New Jersey, the Respondent, has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in case 22–RC–077044. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On May 27, 2014, the General Counsel filed a Motion for Summary Judgment and a memorandum in support. On May 30, 2014, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. On July 17, 2014, the General Counsel filed a letter brief in reply to the Respondent's Response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to recognize and bargain, but contests the validity of the certification on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Board erred in finding the unit to be appropriate and in certifying the Union as the exclusive collective-bargaining representative of the unit.[1] In addition, the Respondent argues for the first time in its response to the Notice to Show Cause that the Board lacks jurisdiction in the instant matter because the Respondent and its employees are subject to the Railway Labor Act. We reject this argument.

The record does not support the Respondent's argument that the employees in the unit found appropriate are indirectly controlled by or under common control with a carrier or carriers to an extent sufficient to invoke the jurisdiction of the National Mediation Board under the Railway Labor Act. In recent cases assessing whether it has jurisdiction over employers who supply services to an airline carrier or carriers but are not themselves engaged in the transportation of freight or passengers, the NMB has focused on whether the carrier or carriers exercise "meaningful control over personnel decisions." See, e.g., *Airway Cleaners, LLC*, 41 NMB 262, 268 (2014) (control exercised is "not the meaningful control over personnel decision[s] required to establish RLA jurisdiction"); see also *Menzies Aviation, Inc.*, 42 NMB 1, 7 (2014) (no jurisdiction where carrier "does not exercise 'meaningful control over personnel decisions'" (quoting *Airway Cleaners*)); *Bags, Inc.*, 40 NMB 165, 170 (2013) (carrier control "is not the type of meaningful control over personnel decisions [sufficient] to warrant RLA jurisdiction"). Where it has not found such "meaningful control," the NMB has emphasized in particular the absence of control over hiring, firing, and/or discipline. See *Menzies Aviation*, 42 NMB at 7 (noting, in finding that airline does not exercise meaningful control over personnel decisions, that it "does not hire, fire, or routinely discipline" service provider's employees); *Airway Cleaners*, 41 NMB at 269 (airline "does not have sufficient control over the hiring, firing and discipline of [service provider's] employees to establish RLA jurisdiction"); *Bags, Inc.*, 40 NMB at 170 (service provider not subject to RLA where airlines "do not have significant control over the hiring, firing and discipline of [provider's] employees").

[1] Relying on the decision of the Supreme Court in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Respondent also argues that the Board was not properly constituted and, therefore, lacked the requisite authority to render any decision or determination in Case 22-RC-077044. We reject this argument.

As an initial matter, this case does not raise a quorum issue because a panel of the current Board, which includes five Board Members who were confirmed by the United States Senate, issued the underlying Decision and Certification of Representative in Case 22–RC–077044. To the extent that the Respondent argues that the Board lacked a quorum when it denied the Request for Review of the Regional Director's Decision and Direction of Election, we find that issue to have been mooted by the intervening decision and certification. In this regard, we note that the Respondent reiterated its arguments regarding the appropriateness of the unit both before the judge who conducted the hearing on the challenged ballots and in its exceptions to the judge's recommended decision, and that a panel of the fully-confirmed Board considered and rejected these arguments when it certified the Union as the exclusive collective-bargaining representative of the unit found appropriate.

Further, the absence of a Board quorum does not impair the Regional Director's authority to process representation petitions. *Durham School Services,* 361 NLRB No. 66 (2014).

Here, the Respondent does not argue that the airlines at Newark exercise "meaningful control over personnel decisions," and the record contains no such evidence. Rather, the elements of control identified by the Respondent are "no greater than that found in a typical subcontractor relationship," *Menzies Aviation,* 42 NMB at 7, which the NMB has made clear is insufficient for assertion of its jurisdiction. Id. We note that Member Geale dissented in part in *Airway Cleaners*, 41 NMB at 273–280, and he dissented in *Menzies Aviation*, 42 NMB at 7–9. However, the evidence of carrier control in the instant case also falls substantially short of the considerations relied upon in Member Geale's dissents.

As for the issues raised by Respondent regarding supervisory status and the appropriateness of the bargaining unit, all of them were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decisions made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with an office and place of business at the Newark Liberty International Airport in Elizabeth, New Jersey, has been engaged in providing fueling services for the commercial aviation industry.

During the 12-month period preceding issuance of the complaint, in conducting its operations described, the Respondent purchased and received at its Newark Liberty International Airport, Elizabeth, New Jersey location goods and supplies valued in excess of $50,000 directly from suppliers located outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[2] The Respondent's request that the complaint be dismissed is therefore denied.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on June 7, 2012, the Union was certified on December 3, 2013, as the exclusive collective-bargaining representative of the employees in the following appropriate unit (the unit):

> All full-time and regular part-time Fueling Supervisors/Dispatchers/Operations Supervisors, Maintenance Supervisors (including Parts Supervisors and Parts Persons), and Tank Farm Supervisors employed by the Employer at its Newark Liberty International Airport, Elizabeth, New Jersey location, but excluding all fuelers, mechanics, utility persons, tank farm persons, leads, office clerical employees, managers, guards, and supervisors as defined by the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

On April 1, 2014, the Union, by certified letter, requested that the Respondent recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with it as the exclusive collective-bargaining representative of the unit. On April 11, 2014, the Respondent, by certified letter, failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about April 11, 2014, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to

bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); accord *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Allied Aviation Service Company of New Jersey, Elizabeth, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 553, International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time Fueling Supervisors/ Dispatchers/Operations Supervisors, Maintenance Supervisors (including Parts Supervisors and Parts Persons), and Tank Farm Supervisors employed by the Employer at its Newark Liberty International Airport, Elizabeth, New Jersey location, but excluding all fuelers, mechanics, utility persons, tank farm persons, leads, office clerical employees, managers, guards, and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Elizabeth, New Jersey, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 19, 2015

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail and refuse to recognize and bargain with Local 553, International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time Fueling Supervisors/Dispatchers/Operations Supervisors, Maintenance Supervisors (including parts supervisors and parts persons), and Tank Farm Supervisors employed by us at our Newark Liberty International Airport, Elizabeth, New Jersey location, but excluding all fuelers, mechanics, utility persons, tank farm persons, leads, office clerical employees, managers, guards, and supervisors as defined by the Act.

ALLIED AVIATION SERVICE COMPANY OF NEW JERSEY

The Board's decision can be found at www.nlrb.gov/case/22-CA-127150 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.